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IN THE
Supreme Court of the United States

OCTOBER TERM, 1948.

No. 217

E. F. HORNER,

Petitioner,

vs.

THE COUNTY OF WINNEBAGO AND A. R. CARTER,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
APPELLATE COURT, SECOND DISTRICT, OF THE
STATE OF ILLINOIS AND SUPPORTING BRIEF.**

✓ JOHN R. SNIVELY,
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Rockford, Illinois,
Attorney for Petitioner.



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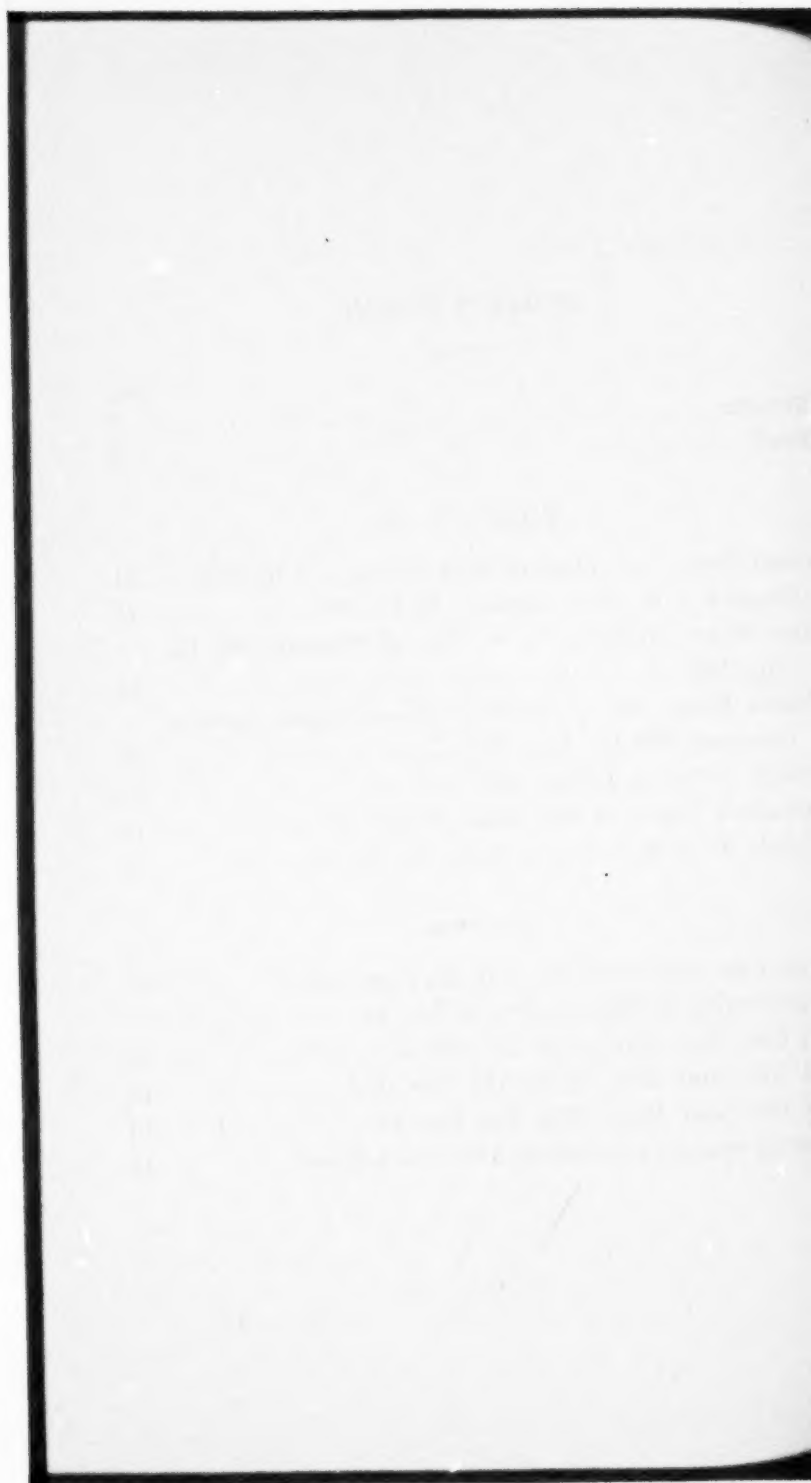
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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, E. F. Horner, respectfully represents, as follows:

This action was brought by E. F. Horner, plaintiff, against The County of Winnebago and A. R. Carter, defendants, in the Circuit Court of Winnebago County, Illinois, to recover damages of \$25,000.00 for trespass to real property.

The complaint, filed August 3, 1945, alleges a continuing trespass. It states in substance that in the year 1930, the defendants broke and entered the land of the plaintiff and seized and appropriated a part thereof, that from said date until the commencement of the action they used and maintained the same as a part of a public street or highway, and that it was without the consent of the plaintiff and

without the institution of any proceedings, or the award of any compensation for the land taken or for the damage to the land not taken.

The defendants, within the time for pleading, filed a motion, supported by affidavits, to dismiss the action, which motion raised the defenses of a prior judgment and the statute of limitations. At the hearing of the motion, the plaintiff presented an affidavit denying the purported facts alleged. Although disputed questions of fact were involved and the plaintiff demanded that the issues be submitted to a jury, the trial court did not deny the motion without prejudice as required by the laws of the State of Illinois, but it granted the motion. The suit was dismissed and judgment was rendered for the defendants.

From the judgment for the defendants, the plaintiff appealed to the Supreme Court. It held that there was no freehold involved, and the case was transferred to the Appellate Court, Second District.

On September 18, 1947, the Appellate Court affirmed the judgment of the trial court, and on February 3, 1948, a petition for rehearing was denied.

On March 12, 1948, a petition for leave to appeal from the Appellate to the Supreme Court was filed in the Supreme Court, and on May 13, 1948, the petition was denied, upon which date the judgment of the Appellate Court became final.

This application is made for a review on writ of certiorari of the judgment of the Appellate Court which is the highest court of the state in which a decision could be had.

Jurisdiction.

The judgment of the Appellate Court became final May 13, 1948.

The jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code.

The federal questions sought to be reviewed were raised in the pleadings in the trial court and in effect by the assignment of errors and argument, and the petition for rehearing, in the Appellate Court.

As heretofore shown, the complaint alleges a continuing trespass (Rec. 1-7). The defendants, within the time for pleading, filed a motion, supported by affidavits, to dismiss the action, which motion raised the defenses of a prior judgment and the statute of limitations (Rec. 7-13). All facts well pleaded in the complaint are admitted by a motion to dismiss. As a result thereof, the continuing trespass was admitted by the defendants. They also admitted that the land was taken without the consent of the plaintiff and without the institution of any proceedings, or the award of any compensation for the land taken or for the damage to the land not taken.

At the hearing of the motion, the plaintiff presented an affidavit denying the purported facts alleged (Rec. 13-14). Although disputed questions of fact were involved and the plaintiff demanded that the issues be submitted to a jury, the trial court did not deny the motion without prejudice as required by the laws of the State of Illinois, but it granted the motion (Rec. 14-15). The trial court held that the statute of limitations was applicable to the cause of action and that it was barred. The suit was dismissed and judgment was rendered for the defendants.

The same issues were raised in the Appellate Court. It also held that the statute of limitations was applicable.

The questions involved are real and substantial. They

are not frivolous, but require analysis and exposition for their decision. The rights which are secured by the Constitution of the United States and the Constitution and laws of the State of Illinois were specially set up and claimed by the petitioner, and were denied him. The rulings of the courts were of such a nature to bring this case within the statutory provision believed to confer jurisdiction on this court.

Questions Presented.

1. Did the state deprive the petitioner of his property without due process of law in violation of the 14th Amendment to the Constitution of the United States by taking the same for public use without compensation?

2. Did the state deny to the petitioner the equal protection of the laws by the failure of the trial court to deny the motion to dismiss without prejudice and to submit the issues to a jury as required by the laws of the State of Illinois?

3. Did the state deny to the petitioner the equal protection of the laws by the Appellate Court ignoring or overlooking the principles relative to a continuing trespass which are stated in the case of *Lake Shore Building Co. v. City of Chicago*, 207 Ill. App. 244, and which are applicable to the instant case?

4. Did the state deprive the petitioner of his property without due process of law, and deny to him the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States?

Reasons Relied on for the Allowance of the Writ.

As stated in the rules, a review on writ of certiorari is not a matter of right, but of sound judicial discretion. In the instant case, there are special and important reasons for allowing the writ.

The Appellate Court has decided a matter of substance not heretofore decided by this court. It also has decided it in a way not in accord with applicable decisions of this court.

The taking of private property by the state for public use without compensation violates the 14th Amendment to the Constitution of the United States.

On a motion to dismiss where disputed questions of fact are involved in an action at law and the opposite party demands that the issues be submitted to a jury, the trial court shall deny the motion without prejudice. Its failure to do so denies such party the equal protection of the laws and deprives him of his property without due process of law.

The decision of the Appellate Court that the statute of limitations is applicable to the cause of action denies to the petitioner the equal protection of the laws. The principles relative to a continuing trespass which are stated in the case of *Lake Shore Building Co. v. City of Chicago* and which are applicable to the instant case, were ignored or overlooked by the court.

Prayer.

Wherefore, your petitioner prays that this Honorable Court grant certiorari to review the judgment of the Appellate Court, Second District, of the State of Illinois, and that upon the hearing, the judgment of the Appellate Court may be reversed and the cause remanded with directions.

E. F. HORNER,

Petitioner,

By JOHN R. SNIVELY,

His Attorney.

BRIEF.

The Opinions Below.

The opinion of the Supreme Court relative to a freehold is reported in 396 Ill. 382, 71 N. E. (2d) 698.

The opinion of the Appellate Court is reported in 332 Ill. App. 217, 74 N. E. (2d) 728.

There was no opinion of the Supreme Court when the application for leave to appeal from the Appellate to the Supreme Court was denied.

Jurisdiction.

The jurisdiction of this court is invoked because a title, right, privilege or immunity is specially set up or claimed by the petitioner under the Constitution of the United States. The state deprived the petitioner of his property without due process of law, and denied to him the equal protection of the laws.

Statement of the Case.

In the year 1930, and for a long time prior thereto, E. F. Horner was the owner and lawfully possessed of certain land situated in the Town of Roscoe, in the County of Winnebago and State of Illinois. The land fronted and abutted upon a certain public street or highway known as River Street and also as State Aid Road No. 16.

Prior to the year 1930 the public street or highway had been used by the public as a highway and had so existed for more than sixty years. The County of Winnebago and A. R. Carter in the fall of 1930 broke and entered into and upon the land, removed the fence which was along the public street or highway, and seized and appropriated a part thereof. The part, so seized and appropriated as aforesaid, was a parcel fifty feet in width along the southerly side thereof. Prior to the time of committing the acts described, the land was level with and on the same grade as the public street or highway, and the plaintiff had full, complete and unimpaired access to, and egress from, the land. The defendants changed or altered the direction or course and the grade of the public street or highway. They excavated and lowered the grade to a depth of eight feet below the grade as it had existed prior thereto. As a result thereof, the access to, and egress from, the land and the improvements thereon, was cut off and destroyed.

From 1930 until the commencement of the action, the defendants used and maintained said part of said land as a part of the altered public street or highway. The public street or highway was changed or altered as aforesaid without the consent of the plaintiff and without the institution of any proceedings. The defendants also changed or altered the public street or highway without awarding any

compensation to the plaintiff for the land taken or for the damage to the land not taken. The plaintiff was deprived of the land and of the occupation and use thereof and sustained damages in the sum of \$25,000.00.

The complaint, filed August 3, 1945, consisted of five counts. It alleges a continuing trespass.

A demand for a jury also was filed.

The defendants, within the time for pleading, filed a motion, supported by affidavits, to dismiss the action, which motion raised the defenses of a prior judgment and the statute of limitations. At the hearing of the motion, the plaintiff presented an affidavit denying the purported facts alleged. Although disputed questions of fact were involved and the plaintiff demanded that the issues be submitted to a jury, the trial court did not deny the motion without prejudice as required by the laws of the State of Illinois, but it granted the motion. The suit was dismissed and judgment was rendered for the defendants.

From the judgement for the defendants, the plaintiff appealed to the Supreme Court. It held that there was no freehold involved, and the case was transferred to the Appellate Court, Second District.

On September 18, 1947, the Appellate Court affirmed the judgment of the trial court, and on February 3, 1948, a petition for rehearing was denied.

On March 12, 1948, a petition for leave to appeal from the Appellate to the Supreme Court was filed in the Supreme Court, and on May 13, 1948, the petition was denied, upon which date the judgment of the Appellate Court became final.

This application is made for a review on writ of certiorari of the judgment of the Appellate Court which is the highest court of the state in which a decision could be had.

Specification of Errors.

1. The trial court erred in granting the motion to dismiss the action.
2. The trial court erred in failing to submit the issues raised by the disputed questions of fact to a jury as required by the laws of the State of Illinois.
3. The trial court erred in not denying the motion to dismiss without prejudice.
4. The trial court erred in deciding that the statute of limitations was applicable to the cause of action.
5. The trial court erred in depriving the petitioner of his right to trial by jury.
6. The trial court erred in dismissing the action and rendering judgment for the defendants.
7. The Appellate Court erred in deciding that the statute of limitations was applicable to the cause of action.
8. The Appellate Court erred in not applying the principles relative to a continuing trespass which are stated in the case of *Lake Shore Building Co. v. City of Chicago*, 207 Ill. App. 244, which are applicable to the instant case, and thereby denied to the petitioner the equal protection of the laws.
9. The Appellate Court erred in depriving the petitioner of his property without due process of law in violation of the Constitution of the United States and the Constitution and laws of the State of Illinois.
10. The Appellate Court erred in affirming the judgment of the trial court.
11. Each of the assigned errors and the entire proceeding manifest a depriving of property without due process of law and a denial to the petitioner of the equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States.

Argument.

The County has the power to exercise the right of eminent domain to construct roads. Existing roads may be altered, vacated or widened as provided by law. (Ill. Rev. Stat. 1947, Chap. 121, Par. 81.) Such a right or rights, however, were not exercised.

While the County may construct roads, it only can do so by making compensation to those who are deprived of their land as provided by the Constitution and laws of the State of Illinois. (Constitution of Illinois, Art. II, Sec. 13.) A taking of private property by the County for public use without compensation is a trespass and deprives the owner of his property without due process of law in violation of the 14th Amendment to the Constitution of the United States as much so as the taking by a railroad company to construct its road without compensation. (*Toledo v. P. W. R. Co. v. Darst*, 61 Ill. 231.) Where the power to take exists, it must be exercised as provided by law. If it is not, a corporation, such as the County, so taking becomes a trespasser and may be proceeded against as such.

Not only were the acts of the defendants in seizing and appropriating a part of the land of the plaintiff and using the same for a public street or highway unlawful and in violation of the 14th Amendment to the Constitution of the United States, but they constitute a continuing trespass. This is not an action for a single trespass, but a series of trespasses or a continuing trespass to real property which constitutes an unlawful taking and use of the land. Damages are claimed, however, for a temporary injury, the loss of the occupation and use of the land, and not a permanent injury. A trespasser can restore possession to the owner at any time. It will not be presumed that the trespass will be continued.

The defendants had no right to the property which they seized and appropriated. No one would contend, because a trespasser has seized and appropriated land for a period of fifteen years, when a suit was brought to recover damages for trespass, that the owner could not recover such damages. Where the acts of the wrongdoer involve a course of conduct which is a direct invasion of the rights of another, such conduct is a continuing trespass. (52 Am. Jur. 849.)

In *Lake Shore Building Co. v. City of Chicago*, 207 Ill. App. 244, the court said:

“Where a person unlawfully places a structure of any kind upon the premises of another, he commits a trespass. Such a trespass, by the great weight of authority, is a continuing one, even though the obstruction may, in a physical sense, be considered as of a permanent character, such as a railroad (*Chicago & I. R. Co. v. Hopkins*, 90 Ill. 316; *Adams v. Hastings & P. R. Co.*, 18 Minn. 236 (260); *Smith v. Chicago A. & St. L. R. Co.*, 67 Ill. 191); a subterranean water tunnel (*City of Chicago v. Troy Maundry Machinery Co.*, 162 Fed. 678); or telephone, telegraph and electric light equipment (*Carpenter v. Capital Electric Co.*, 178 Ill. 29; *Burrall v. American Telephone & Telegraph Co.*, 224 Ill. 266).

As heretofore shown, the complaint alleges a continuing trespass. The defendants, within the time for pleading, filed a motion, supported by affidavits, to dismiss the action, which motion raised the defenses of a prior judgment and the statute of limitations. All facts well pleaded in the complaint are admitted by a motion to dismiss. (*Schuler v. Board of Education*, 370 Ill. 107, *People v. Holten*, 259 Ill. 219, *Canal Comr's v. Village of East Peoria*, 179 Ill. 214.) As a result thereof, the continuing trespass was admitted by the defendants. They also admitted that the land was taken without the consent of the plaintiff and

without the institution of any proceedings, or the award of any compensation for the land taken or for the damage to the land not taken. The statute of limitations is inapplicable to a continuing trespass. (*Maton Bros., Inc. v. Central Illinois Public Service Company*, 269 Ill. 99, aff. 356 Ill. 584.) The trial court and the Appellate Court erred in deciding that the statute of limitations was applicable to the cause of action.

The Constitution of the United States provides, as follows:

“Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

There is a similar provision relative to due process in the Constitution of the State of Illinois.

The Constitution and laws of the State of Illinois also provide, as follows:

“Private property shall not be taken or damaged for public use without just compensation.”

No condemnation proceeding was instituted by the County to take any of the land of the plaintiff for a public street or highway. It is inconceivable that the defendants can unlawfully take and use such land without due process of law. Such confiscatory acts strike at the roots of the fundamental rights that are guaranteed by the Constitution of the United States and the Constitution of the State of Illinois, leaving them valueless, and will result in tyranny and oppression. The Constitution and laws of the State of Illinois give a right of action against the County. This right, however, was denied to the plaintiff by the state courts and a grave injustice was done to him.

No compensation was awarded or paid to the plaintiff for

the land taken or for the damage to the land not taken. Even a condemnation, upon due proceedings, will not deprive the owner of his title or right to possession or of alienation, without payment of the amount awarded by the jury. The last act must be performed before the law will regard the land as lawfully taken or acquired. (*Chicago & I. R. Co. v. Hopkins*, 90 Ill. 316.) As a result thereof, the petitioner was deprived of his property without due process of law.

If disputed questions of fact are involved the trial court may deny a motion to dismiss without prejudice and shall so deny it if the action is one at law and the opposite party demands that the issues be submitted to a jury. (Ill. Rev. Stat. 1947, Chap. 110, Par. 172.) The affidavits and the facts well pleaded in the complaint showed that disputed questions of fact were involved. The action is one at law and the plaintiff demanded, as previously demanded in writing, that the issues be submitted to a jury. The trial court erred in granting the motion to dismiss the action. The trial court erred in failing to submit the issues raised by the disputed questions of fact to a jury as required by the laws of the State of Illinois. The trial court erred in not denying the motion to dismiss without prejudice. The trial court erred in depriving the petitioner of his right to trial by jury. The trial court erred in dismissing the action and rendering judgment for the defendants. As a result thereof, the petitioner was denied the equal protection of the laws.

In its opinion the Appellate Court said, "Appellant has cited no case as sustaining his contentions that the statute of limitations should not apply in this case." The case of *Lake Shore Building Co. v. City of Chicago*, 207 Ill. App. 244, however, was cited in his brief. The principles relative to a continuing trespass which are stated in this case are applicable, controlling and decisive of the instant case.

It is a complete answer to the contentions made by the opposing parties. This case was ignored or overlooked by the Appellate Court. The Appellate Court erred in not applying the principles relative to a continuing trespass which are stated in said case and which are applicable to the instant case. As a result thereof, the petitioner was denied the equal protection of the laws.

For the reasons stated, the Appellate Court erred in affirming the judgment of the trial court.

Each of the assigned errors and the entire proceeding manifest a depriving of property without due process of law and a denial to the petitioner of the equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States.

Conclusion.

This case involves substantial federal questions. Important principles of constitutional law were ignored or overlooked by the state courts. The petitioner was deprived of his property without due process of law, and was denied the equal protection of the laws. There has been a most flagrant and unwarranted violation of the Constitution of the United States and the Constitution and laws of the State of Illinois.

This court should take jurisdiction in order that justice may be done.

Respectively submitted,

JOHN R. SNIVELY,
Attorney for Petitioner.